A

# I-Expo Sdn Bhd v TNB Engineering Corporation Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1–22–1196 OF 2006
KANG HWEE GEE J
25 JANUARY 2007

C *Arbitration — Reference of dispute — Whether interlocutory injunction may be granted pending application to refer dispute to arbitration*

*Civil Procedure — Injunction — Interlocutory injunction — Power of court to grant — Whether injunction may be granted pending referral of dispute to arbitration*

D

*Civil Procedure — Injunction — Interlocutory injunction — Whether serious question to be tried — Whether status quo of the parties would be preserved — Adequacy of damages, consideration of*

E

The plaintiff and the defendant entered into a contract whereby the plaintiff was to decommission and dismantle the defendant's power station and obtain the scrap materials for itself. Under the contract, the plaintiff was, inter alia, to pay the defendant a sum of RM14m in two stages. RM12m was to be paid within two weeks
F of acceptance of the letter of award and RM2m within three months of acceptance of the letter of award. The plaintiff was also required to give the defendant a performance bond of RM3m. The plaintiff alleged that it paid the defendant the first payment of RM12m after which the parties agreed to vary the contract to allow the plaintiff to provide the performance bond after the plaintiff sold the decommissioned and dismantled scrap material. The plaintiff also alleged the requirement to pay the
G further sum of RM2m was also waived by agreement, until after the plaintiff sold certain recovered turbines. The plaintiff was allowed to take possession of the site upon which stood the defendant's power station on payment of the further sum of RM2m and the performance bond of RM3m. The defendant subsequently terminated the contract allegedly on the plaintiff's failure to pay the further sum of
H RM2m and the performance bond of RM3m. The defendant further barred the plaintiff from entering the project site to carry on work. The plaintiff commenced an action in the High Court. The plaintiff also applied (encl 4) for an interlocutory injunction inter alia to allow it to enter the site and remove the scrap pursuant to its contract with the defendant. The plaintiff also sought to prevent the defendant from awarding the contract to any other party. The defendant however applied (encl 8) to
I stay the proceedings pending arbitration pursuant to s 10 of the Arbitration

Act 2005. The defendant argued that its application — encl 8 — should be heard first.

**Held**, allowing the plaintiff's application:

(1) The power to grant an interlocutory injunction encompasses all situations where the court is required to intervene to preserve the status quo of a dispute in order that its decision later would not be rendered nugatory. It applies in all instances whether before or during arbitral proceedings. There was no reason why encl 8 should be heard first (see para 7).

(2) The plaintiff had established that there was a serious question to be tried in respect of its claim. The facts clearly supported the plaintiff's contention that there was a variation with respect to its obligations under the contract (see paras 58–59).

(3) An injunction directing the plaintiff to continue to work the contract would not be mandatory in nature. The court would merely be directing the parties to return to the status quo before the purported revocation of the contract pending the disposal of the claim (see para 61).

(4) In the instant case, it would be more equitable to allow the plaintiff to continue to work the contract until its completion. Whether damages would constitute an adequate remedy could be argued either way. The adequacy of damages was but one of the many considerations in deciding whether to grant the interim injunction (see para 63–64).

**[Bahasa Malaysia summary**

Plaintif dan defendan mengikat kontrak yang mana plaintif untuk tidak menggunakan lagi dan membuka stesen kuasa defendan dan mendapatkan barangan sekerap untuk dirinya. Di bawah perjanjian, plaintif, antara lain, akan membayar defendan sejumlah RM14j secara dua peringkat. RM12j perlu dibayar dalam tempoh dua minggu daripada penerimaan surat penganugerahan dan RM2j dalam tempoh tiga bulan daripada penerimaan surat penganugerahan. Plaintif juga dikehendaki untuk memberikan defendan bon pelaksanaan sejumlah RM3j. Plaintif mendakwa bahawa telah membayar kepada defendan pembayaran pertama sejumlah RM12j selepas pihak-pihak bersetuju untuk mengubah kontrak bagi membenarkan plaintif menyediakan bon prestasi selepas plaintif menjual barangan sekerap yang tidak digunakan dan dibuka itu. Plaintif juga mendakwa syarat untuk membayar jumlah tambahan sebanyak RM2j juga telah diketepikan oleh perjanjian, sehingga selepas plaintif menjual turbin tertentu yang pulih. Plaintif telah dibenarkan untuk mengambil posisi tapak yang mana berdirinya stesen kuasa defendan dengan pembayaran tambahan RM2j dan bon pelaksanaan RM3j. Defendan kemudiannya membatalkan kontrak atas dakwaan plaintif gagal membayar jumlah tambahan sebanyak RM2j dan bon pelaksanaan sebanyak RM3j. Defendan seterusnya menghalang plaintif daripada memasuki tapak projek untuk melakukan kerja. Plaintif memulakan tindakan di Mahkamah Tinggi. Plaintif juga memohon (lampiran 4) untuk satu injunksi interlokutori antara lain untuk membenarkannya

memasuki tapak dan memindahkan sekerap menurut kontraknya dengan defendan. Plaintif juga memohon untuk menghalang defendan daripada menganugerahi kontrak kepada pihak lain. Defendan walau bagaimanapun, memohon (lampiran 8) untuk menangguhkan prosiding sementara ditimbangtara menurut s 10 Akta Timbangtara 2005. Defendan mengatakan bahawa permohonannya — lampiran 8 — harus didengar terlebih dahulu.

**Diputuskan**, membenarkan permohonan plaintif:

(1) Kuasa untuk membenarkan injunksi interlokutori meliputi kesemua situasi yang mana mahkamah dikehendaki campur tangan untuk mengekalkan status quo pertikaian bagi keputusannya yang kemudian tidak menjadi sia-sia. Ianya terpakai di dalam kesemua keadaan sama ada sebelum atau semasa prosiding timbang tara. Tiada sebab mengapa lampiran 8 perlu didengar terlebih dahulu (lihat perenggan 7).

(2) Plaintif telah menunjukkan bahawa terdapatnya persoalan yang serius untuk dibicarakan berkenaan dengan tuntutannya. Fakta dengan jelasnya menyokong pendapat plaintif bahawa terdapatnya perubahan berkenaan dengan kewajipan di bawah kontrak (lihat perenggan 58–59).

(3) Injunksi mengarahkan plaintif untuk menyambung kerja kontrak tidaklah bersifat mandatori. Mahkamah hanya akan mengarahkan pihak-pihak untuk kembali kepada status quo sebelum tujuan pembatalan kontrak sementara melupuskan tuntutan (lihat perenggan 61).

(4) Dalam kes ini, adalah lebih adil untuk membenarkan plaintif untuk menyambung kerja kontrak sehingga selesainya. Sama ada ganti rugi membentuk remedi yang mencukupi bolehlah diperbahaskan mana-mana cara. Kecukupan remedi ganti rugi adalah salah satu daripada pertimbangan yang diambil kira dalam memutuskan sama ada untuk membenarkan injunksi interim (lihat perenggan 63–64).]

**Notes**

For cases on interlocatory injunction, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2867–2982.

For cases on arbitration, reference of dispute, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1222–1231.

**Cases referred to**

*Evans Marshall & Co Ltd v Bertola SA & Anor* [1973] 1 All ER 992 (refd)

*Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 (refd)

*Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133 (refd)

*Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd* [2002] 1 MLJ 33 (refd)

**Legislation referred to**

Arbitration Act 2005 ss 10, 11

*B Thangaraj (Azad Bashir with him) (Bashir & Asha) for the plaintiff.*
*Azlan Sulaiman (Azmi & Associates) for the defendant.*

**Kang Hwee Gee J:**

**[1]** Enclosure 4 is an application for interlocutory injunction to allow the plaintiff to enter into the project site and remove the scrap metals pursuant to a contract entered into with the defendant.

**[2]** Enclosure 8 is an application for stay of proceeding pending the referral of the dispute to arbitration under the contract made pursuant to s 10 of the Arbitration Act 2005 and under the inherent power of the court.

**[3]** Counsel for the defendant raised an objection. He contends that encl 8 should be heard first on two grounds:

(1) Enclosure 8 is a challenge to the civil proceeding being instituted to resolve the dispute in the face of the arbitration clause in the contract signed between the parties. Enclosure 4 could not therefore be heard first.

(2) If encl 4 is heard first and an injunction is granted until the full trial of the action, a subsequent stay under encl 8 will mean that there will be no full trial of the action leaving the injunction to be indefinite and perpetual.

*Counsel for the plaintiff disagrees*

**[4]** Enclosure 4 is an urgent application and the High Court is the only means to protect the interest of the plaintiff as if it is not granted there is no question of the status quo to be maintained pending arbitration. In any case, under s 11 of the Arbitration Act 2005, the High Court is empowered to grant interim injunction or any interim matters before or during arbitral proceeding.

**[5]** One of the reliefs sought in encl 4 is to prevent the defendant from awarding the contract to any other parties by reason of the subsisting contract which has been revoked.

*Reply by defendant's counsel*

**[6]** The words 'before or during arbitral proceeding' in s 11(1) of the Arbitration Act 2005 must necessarily mean that an application for an interim injunction must be made in contemplation of taking out arbitral proceeding and not instituting a suit in the court like the plaintiff has done.

*Court*

**[7]** The power to grant an interlocutory injunction encompasses all situations where the court is required to intervene to preserve status quo of a dispute in order

A that its decision later would not be rendered nugatory. It applies in all instances whether before or during arbitral proceeding. There is no reason why encl 8 should be heard first.

ENCLOSURE 4

B *Plaintiff's submission:*

**[8]** The plaintiff and the defendant entered into a contract whereby the plaintiff was to decommission, dismantle a power station and obtain the scraps therefrom for itself. The contract is contained in the letter of award dated 3 February 2006, C exh 'AMI–3' (p 182–186) encl 3.

**[9]** Under cl 3 of the contract, the plaintiff was required to pay the defendant a sum of RM14m in two stages — RM12m within two weeks of acceptance of the letter of award and RM2m within three months of acceptance of the letter of award. D Under cl 3(d), plaintiff was required to give a performance bond of RM3m. Under cl 3(f), date of completion of decommissioning and removal of the scraps has to be completed by 31 March 2007.

**[10]** The plaintiff had paid RM12m being the first payment. After this payment, E the parties agreed to vary cl 3(d) whereby the plaintiff was allowed to provide the performance bond after the plaintiff sells the scraps after having dismantled the power station. See correspondence — letter dated 23 March 2006 exh 'AMI-18' p 704 (plaintiff's supporting affidavit). This letter shows a waiver on the part of the defendant of the need to provide performance bond before being allowed to take site F possession. By allowing the plaintiff to take site possession for the purpose of commencing works clearly shows that there is a waiver of the requirement on the cl 3(d). The letter dated 23 March 2006 clearly states that the plaintiff has satisfactorily fulfilled all the stipulated condition.

G **[11]** The only ground which the defendant is relying on to terminate this contract is that the plaintiff has failed to pay the performance guarantee of RM3m and a further sum of RM2m. See notice of revocation dated 17 November 2006 last paragraph at p 897 exh 'AMI–47'. (Not disputed).

H **[12]** The requirement to pay the performance bond had been waived until we get proceeds from the sale of the scrap metals. The requirement to pay the further sum of RM2m was also waived by an agreement that it can be paid after the sale of the turbines recovered as scraps. This is evidenced from the correspondences p 738 exh 'AMI–21' — request for the deferment of payment of RM5m (performance bond + RM2m later payment) and p 740 reply from TNEC Construction Sdn Bhd, I a wholly owned subsidiary of defendant purporting to reply on behalf of the defendant approving the proposal in the letter dated 3 April 2006.

**[13]** The defendant has stopped the plaintiff from entering the project site and continuing to carry out the works on 19 July 2006 on various unjustified grounds as

stated in the letter dated 12 July 2006. On 12 October 2006 defendant wrote back to the plaintiff to pay the sum of RM5m (performance bond + RM2m balance payment).

**[14]** We are asking that we be allowed to enter the project site to remove the scraps as per contract and plaintiff is willing to undertake to pay RM2m within one month and RM3m within two months to the court as the main concern of the defendant is non payment of these sums.

**[15]** This is a clear case in which mandatory injunction ought to be granted to allow the plaintiff to enter the project site and prohibitory injunction to prevent the defendant from entering into contract with third party and to sell the scraps.

*Reply by counsel for the defendant*

**[16]** No serious question to be tried on the following grounds:

(a) the revocation of the award was valid;

(b) there was no variation of the terms of the contract with respect to the last payment of RM2m and the duty of the plaintiff to provide the performance bond of RM3m.

**[17]** See letter of award exh 'AMI–3' pp 182–185 cl 3(a) of the letter of award. The letter of award was from the defendant to the Consortium consisting of the plaintiff and another company called TNEC Construction Sdn Bhd. Under the letter of award cl 3(a), the Consortium was required to pay the defendant RM14m by two instalments – the first instalment within two weeks of acceptance of the letter of award and RM3m within three months of the acceptance of the letter of award. In return for this payment the Consortium would be allowed to retain all proceeds from the sale of the scrap metals from the demolition of the sub-station (actually three thermal units of the sub-station). In addition cl 3(d) required the Consortium to produce the performance bond for a value of RM3m valid for the whole contract period in favour of the defendant within two weeks of the acceptance of the Award. Clause 7 of the letter of award expressly provided that the defendant reserved the right to revoke the letter of award should there be failure by the Consortium to pay the RM12m or to pay the additional RM2m or to provide the performance bond within the time frame stipulated.

**[18]** The letter of award was dated 3 February 2006 and was accepted by the Consortium on 25 February 2006. This means that the initial payment of RM12m was to be paid by 11 March 2006. The performance bond of RM3m was to be provided by 11 March 2006 and the second payment of RM2m was due by 25 May 2006.

**[19]** The Consortium did not pay the additional RM2m and did not provide the performance bond in accordance with the letter of award. On 17 March 2006, the defendant demanded that the Consortium to provide the performance bond within seven days. This letter is at encl 3 exh 'AMI–24' pp 766–767. On the 17 March

2006, the Consortium partner also demanded that the plaintiff provided the performance bond to the defendant and threatened to terminate the contract. On the 24 March 2006 the defendant demanded the Consortium to provide the performance bond and again threatened to revoke the letter of award in the event the Consortium did not do so. This letter is at p 769. On the same day 24 March 2006 the Consortium partner demanded the plaintiff to provide the performance bond and in this letter stated 'in order to avoid possible contractual complication'. This letter is at p 770. On p 245 para 6 which says 'The Contractor shall only be granted access to site upon full satisfaction of the above conditions and upon the Employer obtaining approved Environmental Management Plan from DOE.' — this means that the performance bond is provided after the commencement date of this notice. The explanation for the letter at p 704 (acknowledging pre-conditions to contract had been satisfied and inviting plaintiff to take site possession) has been given in para 24 of the defendant's affidavit (encl 12): the letter was given pursuant to cl 4 of the Request for Proposal at p 243 exh 'AMI-5' encl 3 purely to designate a commencement date. The letter was issued to coincide with TNB's letter to the defendant dated 22 March 2006 page 116 of the defendant's affidavit saying that the defendant had satisfactorily fulfilled the pre-condition in the letter of acceptance.

**[20]** **Submit**: The first paragraph acknowledging the fulfillment is a mistake. This letter was issued on 23 March 2006 consistent with there being no variation of the letter of award, the defendant on the 17 March 2006, 24 March 2006 and 31 March 2006 continued to demand the Consortium to provide the performance bond. Consistent there being no variation, even the plaintiff's Consortium partner on 17 March 2006, 24 March 2006 and 1 April 2006 demanded the plaintiff to provide the performance bond. The conclusion is this, the letter dated 24 March 2006 is simply to designate the commencement of date.

**[21]** On p 738, with respect to plaintiff's proposal to pay performance bond and balance payment: this is explained in paragraph 17.4 in plaintiff's affidavit, the plaintiff had alleged that the variation took place in the middle of March 2006, then there could not have been an appeal or a request for variation on the 3 April 2006 by this letter.

**[22]** With respect to the letter dated 7 April 2006, it is a letter from the Consortium partner to the plaintiff which made six proposals, was not our reply to the plaintiff's proposal but a reply from the plaintiff's consortium partner and does not indicate the defendant's acceptance. NB: In paragraph 17.6 of the plaintiff's affidavit the plaintiff itself admits that this letter at p 740 contains additional terms which were never agreed to.

**[23]** With respect to letter from the defendant dated 24 April 2006 at pp 773 to 774, this is in reply to the request made by the plaintiff dated 24 April 2006 to defer the submission of the performance bond, the defendant made a counter proposal. This is clear from the first paragraph 'subject to the following conditions'. It is a counter proposal because it requires the payment of sale proceed to be made to a stakeholder for purpose of distribution of proceeds and to ensure the payment to the sub-contractor. The defendant would take the RM2m + RM3m from the stakeholder

account. Consortium never accepted to this proposal. This counter proposal has never been accepted by the defendant (see averment in defendant's affidavit para 15.14).

**[24]** Now refer to affidavit of defendant — letter exh 'D–1' at p 79. Letter shows that the plaintiff made a proposal to the Consortium to sell the turbines to a company called Mutiara Powertech Sdn Bhd for RM4.5 million and further proposed that this sale proceed be paid to the defendant to satisfy the further payment of RM2m and the performance bond of RM3m. Question: Why should there be such a proposal if indeed as the plaintiff says in para 17.4 of encl 3 that there is already a variation of the pre-condition with respect to the performance bond and the subsequent payment in March 2006?

**[25]** The plaintiff has never responded to the defendant and its Consortium's demand to satisfy the pre-condition on the performance bond and further payment by alleging that there was a variation.

**[26]** The plaintiff has raised the question of variation only on 8 November 2006 for the very first time.

**[27]** Submit: It is an afterthought which should not have featured in the submission. This letter is at encl 3 exh 'AMI-19' para 1.5. The defendant had responded to this letter in the letter of revocation dated 17 November 2006 at pp 720–725.

**[28]** The defendant in issuing the letter of revocation had acted lawfully in accordance with cl 7 of the letter of award which read as follows:

> TNEC reserved the right to revoke this letter of award should there be failure by the Consortium to meet the requirement for: TNEC reserved the right to revoke this letter of award should there be failure by the Consortium to meet the requirement for:
>
> (a) 'CASH' payment of RM12,000,000; and
>
> (b) Performance Guarantee of RM3,000,000 (both a and b are to be submitted to TNEC within two weeks after acceptance of this letter of award); and
>
> (c) CASH payment of RM2,000,000 to be paid to TNEC within three months of acceptance of the letter of award.
>
> (the three pre-conditions not satisfied including the two. Only one satisfied.) Breach of fundamental terms. Therefore entitled to revoke contract and claim damages.

**[29]** Parties have finished submitting on the 'serious question to be tried'. Parties are now submitting balance of convenience.

*Plaintiff's submission:*

**[30]** Balance of convenience is in our favour for the following reasons:

**[31]** We had already paid RM12m to the defendant in pursuant to the contract.

**[32]** All that is required of us to do to complete our obligation is to recover the scraps.

**[33]** We had already paid insurance for the benefit of the defendant as follows:

(a) public liability insurance covering a liability upto RM60 million out of a premium of RM267,760;

(b) workmen compensation insurance premium for our workers amounting to RM7,875 covering all accidents of our workers.

**[34]** Our machineries and equipment worth RM1,676,985 had been mobilised to the site and now stuck at the project site by reason of the defendant's action.

**[35]** There are 100 workers still on the plaintiff's payroll and we have to pay a monthly salary of RM110,000 per month.

**[36]** We had entered into contracts to hire equipment where the plaintiff had to pay RM10,000 per day.

**[37]** We had also entered into forward contracts to sell to third party the scraps to be recovered from the project site.

**[38]** The completion date of the scrapping is 31 March 2007.

**[39]** It would be in the interest of both parties that the plaintiff be allowed to carry out the works of dismantling the scraps as the plaintiff's equipment and workers are ready to remobilise to complete the works.

**[40]** Damages in this case is not an adequate remedy because it may involve various parties. See case of *Evans Marshall & Co Ltd v Bertola SA & Anor* [1973] 1 All ER 992 at p 1005 per Sachs LJ:

> In my judgment damages would not be an adequate remedy in this case, any more than they were held to be in any of the three cases already cited, *Warner's case* [1936] 3 All ER 160; [1937] 1 KB 209, the*Decro-Wall case* [1971] 2 All ER 216; [1971] 1 WLR 361 and *Hill v C A Parsons & Co Ltd* [1971] 3 All ER 1345; [1972] Ch 305. The courts have repeatedly recognised that there can be claims under contracts in which, as here, it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damage which cannot be taken into monetary account in a common law action for breach of contract: loss of goodwill and trade reputation are examples — see also, in another sphere, the judgment of Jenkins LJ in *Vine v National Dock Labour Board* [1956] 1 All ER 1 at p 10; [1956] 1 QB 658 at p 676 which, albeit a dissenting judgment, was unanimously adopted in toto in the House of Lords [1956] 3 All ER 939; [1957] AC 488. Generally, indeed, the grant of injunctions in contract cases stems from such factors.

Also at p 1004 on flexibility of the approach:

The line of approach to the exercise of the court's discretion whether or not an interlocutory injunction should be granted is that stated by Lord Denning MR in *Hubbard v Vosper* [1972] 1 All ER 1023 at p 1029; [1972] 2 QB 84 at p 96:

> In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint on the defendant but leave him free to go ahead... The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.

It is true that this statement of Lord Denning MR was obiter, but it expresses in felicitous language the view applied nine days earlier in his considered judgment and in mine in *Hill v CA Parsons & Co Ltd* [1971] 3 All ER 1345 at pp 1349, 1350, 1354, 1355; [1972] Ch 305 at pp 314, 320. There, too, when joining in rejecting a sub mission that a much-followed practice had become a rule of law — see [1971] 3 All ER at pp 1351, 1352; [1972] Ch at pp 320, 321, I held that flexibility was an essential feature of the court's jurisdiction. That was a master and servant case. There can always arise other special cases in which it is proper to maintain a status quo irrespective of whether the relief granted at trial will include a permanent injunction.

**[41]** The plaintiff is to pay (apart from the usual undertaking in an injunction) RM2m within 30 days and an additional sum of RM3m within 60 days.

*Defendant's counsel submission:*

**[42]** Prayer (a) of encl 4 is mandatory and prohibitory in nature as it prohibits the defendant from preventing the plaintiff from re-entering the project site and allowing the plaintiff to enter the project site at the plaintiff's will. It does not preserve the present status quo. And the plaintiff will receive the full and entire relief of its claim before the matter is adjudicated upon. This is because if allowed into the project site the plaintiff will likely carry out the works and complete the contract although it had been terminated by the defendant.

**[43]** Damages are an adequate remedy. The main claim in the writ is for a declaration that the revocation was valid, see *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 per Abdoolcader J (at p 150):

> The first is that it is couched in prohibitory terms restraining the appellant until the trial of the suit from remaining in the quarters but it is in effect a mandatory injunction. Equity looks to the substance and intent and not to the form, and the interlocutory injunction sought and granted although prohibitory in language is mandatory in substance and effect — *Shepherd Homes Ltd v Sandham* [1970] 3 WLR 348, 359 (at p 359); *Hounslow Local Borough Council v Twickenham Garden Developments Ltd* [1970] 3 WLR 538, 570-1 (at p 570-1), and as I said in my judgment in *Wah Loong (Jelapang) Tin Mine Sendirian Berhad v Chai Nyen Yiok* [1975] 2 MLJ 109, an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases.

**[44]** *Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd* [2002] 1 MLJ 33 at p 40 per Alauddin Mohd Sheriff JCA:

> Conclusion
>
> In an application for a mandatory interlocutory injunction, the applicant will have to show that they have an unusually strong and clear case and that there are special circumstances before the court will grant them relief. This test was approved by the English Court of Appeal in *Locabail International Finance Ltd v Agroexport* [1986] 1 All ER 901. The rationale for this test is simple to understand. Since the relief of mandatory injunction sought in an interlocutory application would be the primary relief of the applicant in his main action, the applicant must convince the court to its satisfaction that he indeed has a high degree of success at the trial of his action.

**[45]** There are doubts as to whether the plaintiff will be able to satisfy the defendant's damages in the event the injunction is granted but the plaintiff subsequently fails in its claim. The plaintiff has not provided any information about its financial capability to pay the damages. The search on the plaintiff company with the Companies Commission of Malaysia reveals that no information of financial statement and profit and loss was available. In response to this challenge the plaintiff merely states in para 38 of its second affidavit in support that the sale of the scrap metals would allow it to pay damages thereby indicating that the plaintiff is relying on its scrap metals.

**[46]** Search by the plaintiff on the defendant company shows that it is commercially solvent as opposed to the financial position of the plaintiff which cannot be verified from the company's search.

**[47]** Public interest requires the project to be completed as soon as possible. If injunction is granted the completion of the project would be delayed. See *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133 at p 138 per Gopal Sri Ram JCA:

> That brings us to the question of remedy. The evidence on record shows that the offending pylon forms part of the national grid for the conveyance of electricity. It is therefore clear that if a mandatory injunction is maintained there will be disruption of electricity supply in Peninsular Malaysia. It is not in the public interest that such a disruption should occur.
>
> In *Smith v Inner London Education Authority* [1978] 1 All ER 411, Browne LJ held that public interest was always a relevant consideration in granting specific relief. This is how he put it (at p 422 g–h of the report):
>
> > ... I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.
>
> No doubt that was said in the context of an interlocutory injunction. But we do not regard the principle to be any different in the case of a final injunction, whether prohibitory or mandatory in nature.

The learned judge in this case failed to take into account public interest. If the learned judge had done so he would have held that the public interest outweighs the respondent's interest. Accordingly we would set aside the mandatory and prohibitory orders made by the court below. This suit is now remitted to the High Court for assessment of damages.

**[48]** Public interest element in this case as project is for the redevelopment of Perai Power Station which requires the job of scrapping to be completed by May 2007.

**Submit**: Plaintiff not entitled to scraps as plaintiff has failed to pay the further payment of RM2m.

**[49]** Presently the plaintiff has failed to provide the performance bond. Plaintiff has also assigned its interests in the scraps to third party. If they had assigned they were not entitled to it.

**[50]** Under the TNB award to the defendant (the main contractor), the defendant had to complete the whole works by 14 May 2007 and will have to pay damages to TNB of RM50,000 per day for delay. If injunction is granted the defendant will not be able to engage new contractor to finish the works. If the contractor can engage new contractor, dateline can be met.

**[51]** Plaintiff is not in a position to pay the damages (refer exh 'D-8' encl 12 — search on the plaintiff at the Companies Commission of Malaysia). The financial statement discloses no information pertaining to the financial statement or the profit & loss account.

**[52]** Plaintiff never intended to carry out the works itself. Upon giving award by the defendant, the plaintiff sub-sub contract the works. Now they are asking to do it themselves when they never intended to carry out the works themselves.

**[53]** The plaintiff had been injuncted earlier on 18 August 2006 from abstracting the scrap metals and selling the scrap metals. This was dissolved on 13 November 2006. On 15 November 2006 and 16 November 2006 they entered the site. This has not been disclosed in this application and they had taken the scrap metals.

**[54]** If plaintiff is given the injunction to be allowed back into the project site to complete the work there is a danger they will not carry out the physical work as per the requirement of the contract because the demolition sub-contractor was terminated on the 4 July 2006 even before they were stopped work (see exh 'AMI–35' p 827 encl 3 — plaintiff's own affidavit). No evidence has been adduced by the plaintiff on the appointment of any new demolition works sub-contractor.

**[55]** The defendant is now faced with three claims arising out of plaintiff's performance. The first claim is made by a company called Prai Power Sdn Bhd for damages of RM1.77 million suffered from excessive pollution caused by demolition works performed by the plaintiff's sub-contractor at the site. The second claim is a claim at exh 'D-2' of encl 12 brought by the sub-contractor. And the third claim is a claim by forward purchaser against the plaintiff at exh 'D-3'. This means that in the

short period between March and July when the plaintiff carried out works that caused these claims to arise. The defendant is exposed to other claims for which the defendant has no protection. The plaintiff has further received considerable sum of money from forward buyers.

FINDINGS AND DECISION

**[56]** This judgment had been prepared and was ready for delivery on 9 January 2007 itself when the parties informed the court that they were settling and urged the court not to deliver judgment.

**[57]** Since the parties have been unable to settle, this decision must now be delivered as follows:

**[58]** The plaintiff has established that there is a serious question to be tried on the claim that it is seeking.

**[59]** The very fact that the defendant had allowed the plaintiff to take such action before the performance bond and the final payment of the RM2m had been provided by the plaintiff and thereafter had allowed the plaintiff to work the contract for four months before deciding to purportedly revoke the contract, clearly supports the plaintiff's contention that there was a variation with respect to the plaintiff's obligation on these two essential conditions of the contract.

**[60]** The balance of justice in my judgment should fall in favour of allowing the plaintiff to continue to perform the contract.

**[61]** I disagree with the submission of counsel for the defendant that the injunction sought by the plaintiff in this application is mandatory and prohibitory in nature. It is to be noted that what plaintiff is seeking is a return to status quo giving itthe right under the contract it signed with the defendant to decommission, dismantle and remove the scraps from a part of the power station. An injunction directing the plaintiff to continue to work the contract is not mandatory in nature as all that the court is doing is to direct the parties to return to status quo before the purported revocation of the contract pending the disposal of the present claim. It is not an order directing the defendant to do something more than what the plaintiff is entitled to under the contract.

**[62]** All that the plaintiff had allegedly failed to do is to provide the performance bond and to pay the final payment of RM2m within the time limited in the contract. All that the defendant would be able to recover from the plaintiff is limited to the recovery of the final payment of RM2m and any such damages as may arise from its failure to perform the contract. In the event that the plaintiff should fail in its action against the defendant all that it has to pay to the defendant is the sum of RM2m and any such damages in the event that it fails to perform its obligation under the contract which should be covered by a performance bond which the plaintiff had promised to take out.

**[63]** On the other hand, the plaintiff had already paid to the defendant the sum of RM12m and pursuant thereto had entered the site to perform its obligation with its machineries. It would be more equitable under the circumstances to allow the plaintiff to continue to work the contract until completion.

**[64]** It may well be argued either way that damages would constitute adequate remedy but adequacy of damages is but one of the many considerations to be considered in deciding whether to grant this interim injunction.

**[65]** Question of delay does not arise. Delay would be unavoidable whether or not a new contractor is engaged by the defendant to complete the work or whether the plaintiff recommences its works from where it left off. It is more probable that there would be lesser delay if the plaintiff is to be allowed to return to work to complete the contract as the infrastructure it had organised at the site is already in place.

ENCLOSURE 4

**[66]** Order in terms.

ENCLOSURE 8

**[67]** To be heard by the succeeding judge.

*Plaintiff's application allowed*

Reported by John Paul Simon